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O'NEAL, an individual, AARON SPELLING,
an individual, CANDY SPELLING, an
individual, NANCY HAYES, an individual,
and LOU ADLER, an individual.

19 Petitioners,

20 v.
21 CALIFORNIA COASTAL COMMISSION, a
22 California state agency, and DOES 1 through
50, inclusive.

23 Respondents.

24 GAMMA FAMILY TRUST, BROAD
25 REVOCABLE TRUST and NANCY M.
DALY LIVING TRUST.

26 Real Parties-in-Interest.

10 Case No. BS063276

11 PETITIONERS' OPENING BRIEF IN
12 SUPPORT OF PETITION FOR WRIT
13 OF MANDATE

14 [The Honorable David Yaffe presiding in
15 Department 86]

16 Petition filed May 12, 2000

17 Hearing Date: April 10, 2001
18 Time: 9:30 a.m.
19 Dept: 86

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I. INTRODUCTION AND SUMMARY OF ARGUMENT

This case is an example of back room politics at its worst. Respondent California Coastal Commission ("Commission"), charged with the protection of California's coastal resources, made a deal with three wealthy, powerful, and prominent individuals which allows them to construct three large beachfront homes on Carbon Beach, eliminating three previously required on-site view corridors. Instead, the Commission allowed these individuals ("Real Parties" or "Applicants")¹ to donate as public view and beach access a narrow lot on rocky and unsafe La Costa Beach ("the La Costa Lot"), located on an accident-ridden, dangerous curve of Pacific Coast Highway with treacherous pedestrian access, no public parking, and no public amenities. To top it off, the Commission — obviously anticipating that its action would not survive judicial scrutiny — expressly provided that in the event that litigation such as this mandate action by Petitioners made dedication of the La Costa Lot impossible, Applicants could substitute for this off-site "mitigation" a cash payment of \$1 million.

In approving this scheme, the Commission violated both the California Coastal Act (the "Coastal Act")² and the California Environmental Quality Act ("CEQA").³ The Commission failed to make numerous findings required by law, including findings regarding the suitability of the site for public access. The Commission made other "findings" that were mere conclusory assertions without any evidence whatsoever in the record to support them, including findings regarding traffic safety and beach safety.

Indeed, the evidence presented to the Commission demonstrated that this section of Pacific Coast Highway is highly unsafe, has limited motorist and pedestrian visibility, has been the site of numerous traffic accidents, has no traffic lights or crosswalks, has no public parking and inadequate resident parking, and has no public amenities. The evidence also showed that the beach itself is

¹ The Real Parties are the Gamma Family Trust ("Gamma"), created and controlled by media mogul Haim Saban; the Broad Revocable Trust ("Broad"), established and controlled by real estate tycoon Eli Broad; and the Nancy M. Daly Living Trust ("Daly"), formed and controlled by the wife of Los Angeles Mayor Richard Riordan.

² Public Resources Code §§ 30000, et seq.

³ Public Resources Code §§ 21000, et seq.

1 narrow, rocky, has strong riptides, and a precipitous deep water shelf, making the contemplated
2 public use of the beach extremely risky.

3 Not only are the La Costa Lot and the adjacent beach unsafe and inappropriate for public use,
4 they do not even serve the stated function of mitigating the lost views caused by the Applicants'
5 construction. The Commission failed to make any findings regarding the proximity of the off-site
6 view corridor to the Applicants' property and failed to make sufficient findings establishing the
7 adequacy of the off-site view corridor (or the \$1 million pay-off) to mitigate the impact of the
8 Applicants' projects.

9 Given the evidence in the record, only one result is possible. The Commission should be
10 commanded to set aside its decision approving the La Costa Lot/each payment off site mitigation
11 scheme and to comply fully with the evidentiary analysis and environmental review required by the
12 Coastal Act and CEQA.

13 II. SUMMARY OF FACTS

14 In 1999, each of the Real Parties applied to build large beachfront residences on Carbon
15 Beach in the city of Malibu. [Administrative Record] 3-4 (Gamma); 30 AR 1763 (Broad); 40 AR
16 2413 (Daly). These applications involved demolition of six existing residences and construction of
17 three large new residences in their place. 13 AR 1095. Each of the three applications was approved
18 by the Commission with special conditions designed to ensure compliance with the policies of the
19 Coastal Act by requiring, among other things, that each of the Applicants provide 20 to 36 foot wide
20 public view corridors on site (11 AR 683), constituting no less than 20% of the beach frontage of the
21 properties in question. 9 AR 597; 31 AR 1876, 1880; 49 AR 3387, 3391. In connection with each of
22 the three permits, the Commission expressly found that these public view corridors were required to
23 preserve the public's right to the visual and recreational resources of Carbon Beach in compliance
24 with the Coastal Act. See e.g. 11 AR 716 (Gamma). For example, in connection with the Gamma
25 permit, the Commission found that:

26

27

28 * Hereafter, Administrative Record material will be cited as [volume] AR [page].

1 "the visual quality of the Carbon Beach area in relation to public views from Pacific
2 Coast Highway have been significantly degraded from past residential development.
3 . . . Specifically, the Commission notes that when residential structures are located
4 immediately adjacent to each other, or when large individual residential structures are
5 constructed across several contiguous lots, such development creates a wall-like effect
6 when viewed from Pacific Coast Highway. . . . The Commission notes that Policy I:38
7 of the [certified Malibu/Santa Monica Mountains Land Use Plan] LUP, as consistent
8 with Section 30251 of the Coastal Act, provides that new development on a
9 beachfront property located on the seaward side of Pacific Coast Highway, such as
10 the subject site, should reserve 20% of the linear frontage of the lot as visually open
11 area to provide and maintain adequate public coastal views." 11 AR 716-719. See
12 also 11 AR 755-758 (Broad) and 45 AR 2589-2592 (Daly).

13 On approximately March 28, 2000, the Real Parties applied for amendments to each one of
14 their respective coastal permits. 32 AR 1925. With uncharacteristic and almost unbelievable speed,
15 the Commission staff notified Real Party Broad that his amendment application filed on March 30,
16 2000 would be heard on April 12, 2000. 32 AR 1925. The Commission staff then prepared a staff
17 report dated March 28, 2000 (the "Staff Report") recommending permit amendments to each of the
18 three applications. 11 AR 673-691.

19 The Staff Report recommended Commission approval of amendments to the applications
20 which would substitute "off-site" mitigation instead of the previously required on-site public view
21 corridors. The proposed amendments (the "Amendments") would eliminate the requirement that the
22 Applicants devote 20% of their properties' frontal lineage for public view corridors and would allow
23 Applicants to enlarge the permitted homes within those previously designated public view corridors,
24 provided that the Applicants dedicated the La Costa Lot located at 21704 Pacific Coast Highway to
25 the California Coastal Conservancy (the "Conservancy") for public view and beach access. 11 AR
26 673, 674, 678-679, 683-687. Nowhere in the Staff Report prepared for the April 12, 2000 meeting
27 was there any mention of a \$1 million cash payment in lieu of the offered view and access over the
28 La Costa Lot. Neither did the Staff Report discuss any public safety issues or analyze any

1 environmental impacts that might be triggered by use of the La Costa Lot as a public view and beach
2 access site.

3 The Amendments were considered by the Commission at a public hearing held on April 12,
4 2000. 12 AR 1005-1065. Although the notice of hearing was purportedly posted at the Applicants'
5 residences on April 3, 2000 (10 AR 663-664; 12 AR 897-898, 961-965; 32 AR 1928), news about the
6 proposed La Costa Lot dedication did not reach most of the neighbors until approximately April 6.
7 2000, when an article ran in the local Malibu Times (12 AR 1038). The City of Malibu did not hear
8 of the proposal until April 6, 2000. 11 AR 842.

9 Prior to the April 12 hearing, the Commission received extensive written comments on the
10 Amendments, including at least 30 in opposition. See 11 AR 815-896. In fact, virtually none of the
11 written comments were in favor of the Amendments. These letters, including one from the City of
12 Malibu and many from long time residents, presented extensive evidence that the La Costa Lot was
13 unsuited for the proposed public access use because of acute risks to public safety, both on Pacific
14 Coast Highway and on La Costa Beach itself. 11 AR 815-896. The Commission received evidence
15 that the portion of Pacific Coast Highway immediately adjacent to the La Costa Lot was extremely
16 dangerous because visibility is limited, traffic moves at high speed, and the highway curves steeply
17 at that location. 11 AR 815-896. In fact, evidence was presented that this stretch of Pacific Coast
18 Highway is responsible for fully 20% of all the vehicle collisions which occur on the 26 miles of
19 Pacific Coast Highway between Topanga Canyon Boulevard and the western boundary of Malibu.
20 11 AR 842-844; 11 AR 894-895.

21 In addition, extensive oral testimony was presented to the Commission at the April 12
22 hearing. See 12 AR 1005-1065. Local residents, including one former member of the City of Malibu
23 Transportation Commission (12 AR 1035), testified that this stretch of Pacific Coast Highway had
24 been the location of a high number of traffic accidents, and such accidents would dramatically
25 increase if pedestrian beach access was opened at the proposed location, particularly given the
26 complete lack of any parking or safe pedestrian access at this location. 12 AR 1020-1044. The
27 Commission also heard testimony from numerous long time residents of Malibu who gave first hand
28 accounts of the danger of the Pacific Coast Highway access to the La Costa Lot and traffic accidents.

1 they had observed at that location, as well as the strong riptide, precipitous deep water shelf, and
2 rocky nature of the swimming area adjacent to the La Costa Lot. 12 AR 1020-1044.

3 No contrary factual evidence was presented to the Commission, either by witnesses or by the
4 Commission staff. During the hearing, various members of the Commission summarily dismissed
5 without analysis or study the threat to public safety presented by the La Costa Lot. For example,
6 Chair Wan stated:

7 "there is no ideal site in Malibu, when it comes to the Pacific Coast Highway. It is a
8 very dangerous highway. This is about as good a site as any site, and it is an
9 important mandate of this Commission that we obtain and open the publicly owned
10 beaches to the public." 12 AR 1062.

11 The only speakers in support of the Amendments were the Applicants' representative (see 12 AR
12 1005-1065) and staff of both the Coastal Commission and the Coastal Conservancy. Staff attempted
13 to address the traffic safety issue by stating that:

14 "I think there are a number of people who would argue that the entire 26-mile stretch
15 of Pacific Coast Highway through Malibu is too dangerous, and relative to that, there
16 should be no public access anywhere. It is something that, you know this
17 Commission cannot regulate traffic. We cannot control the way people drive through
18 Malibu" 12 AR 1045-1046.

19 Following the hasty hearing, at which many speakers asked to be given more time to present
20 and analyze this issue (12 AR 1021-1022, 1036, 1038-1039, 1040-1041), the Commission voted
21 unanimously to amend the conditions originally imposed on the Applicants' permits by eliminating
22 the on-site view corridors and instead conditioning construction of the Carbon Beach homes on the
23 Applicants' dedication of the La Costa Lot for public view and beach access to the California
24 Coastal Conservancy.⁶ The Commission also hastily added language to the conditions to allow for
25 the \$1 million cash alternative "buy out," in the event the Applicants could not dedicate the La Costa

26 ⁶ On April 27, 2000, the California Coastal Conservancy voted to accept the dedication of the La
27 Costa Lot for public view and beach access and indicated its intent to open public access at that
28 location. That action is the subject of a separate proceeding for writ of mandamus pending as Case No.
BS063275 in Department 85.

1 LaC. This "buy out" proposal was raised for the first time by the Deputy Attorney General during the
2 staff presentation at the hearing. 12 AR 1014. There was no testimony or evidence regarding the
3 value of the view corridors at stake.

4 On May 12, 2000, Petitioners filed this mandate action, serving the Commission shortly
5 thereafter. Nearly six weeks after the Commission had substituted the off-site La Costa Lot
6 mitigation scheme for the original on-site view corridor requirements, the Commission staff issued a
7 second staff report dated May 29, 2000, containing "Revised Findings" that purported to reflect and
8 support the Commission's actions taken at the April 12, 2000 hearing. 13 AR 1095, 1105-1109.

9 In fact, however, this second staff report contained new "findings" purportedly addressing
10 traffic and beach safety which were not contained in the March 28, 2000 Staff Report and which
11 were unsubstantiated by any competent evidence considered by the Commission prior to its April 12,
12 2000 decision. On June 13, 2000 the Commission adopted the Revised Findings. 13 AR 1121-1127.

13
14 **III. THE COMMISSION VIOLATED THE COASTAL ACT BECAUSE THE LA COSTA**
15 **LOT DOES NOT PROVIDE SAFE PUBLIC ACCESS AND DOES NOT MITIGATE THE**
16 **IMPACT OF APPLICANTS' CONSTRUCTION ON VISUAL RESOURCES**

17 In this case, the Commission violated the Coastal Act in three ways. First, it made findings
18 about the public safety of the La Costa Lot which were not supported by the evidence in the record.
19 Second, it failed to make any findings at all regarding the suitability of the site for public use that
20 must be considered under the Coastal Act. Lastly, it failed to make findings or present any evidence
21 that the use of the La Costa Lot mitigates the visual impacts of the Applicants' construction on
22 Carbon Beach. Any one of these failings justifies issuance of the requested writ.

23 **A. The Standard of Review**

24 The standard of review for the Coastal Act claim is whether the Commission committed a
25 prejudicial abuse of discretion under Code of Civil Procedure §1094.5(b). Abuse of discretion is
26 established if the agency has not proceeded in the manner required by law, if its decision is not
27 supported by the findings, or its findings are not supported by substantial evidence in light of the
28 whole record. Code of Civ. Proc. §§1094.5(b) and (c).

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1 Commission proceedings involving the issuance of a coastal development permit are quasi-
2 judicial. *City of Coronado v. California Coastal Zone Conservation Commission*, 69 Cal.
3 App.3d 570, 574 (1977) ("[w]e join in a chorus of cases holding 'beyond any doubt' the permit-
4 issuing functions of the Coastal Commission are quasi-judicial in nature").

5 In a writ of mandamus action challenging the Commission's quasi-judicial determination, the
6 court must decide if the determination was "supported by substantial evidence in light of the whole
..... *California Coastal Commission*, 19 Cal.

where (1) it is inconsistent with public safety, military security needs, or the protection of fragile coastal resources . . ." (Emphasis added).

Furthermore, any coastal development permit issued by the Commission must be accompanied by findings that the proposed project is in conformity with the policies set forth in Chapter 3. PRC §30604(a).

1. The Commission's Finding That Access From The La Costa Lot Is Safe For Pedestrians And Motorists Is Unsupported By Any Evidence.

In its Revised Findings, the Commission acknowledged — as it must — its obligation to make decisions consistent with public safety concerns, even quoting PRC §§30210 and 30212(a).
13 AR 1102. However, the Commission's findings that the La Costa Lot was suitable, from a public safety perspective, as a public access to the beach (13 AR 1105-6) is not supported by a scintilla of evidence. Instead, the Commission's determination consisted of unsupported conclusions. For instance, the Commission stated that:

14 "...the subject site is typical for beachfront lots along Pacific Coast
15 Highway and that use of the mitigation site for public access and
16 viewshed presents no greater hazard to traffic and pedestrians than the
17 use of any other public vertical accessways which are open and
18 available for public use which are located along Pacific Coast
19 Highway in the Malibu area." 13 AR 1105.

There was no evidence at the hearing, and there is none in the record, that the La Costa Lot "presents no greater hazard" than any existing accessways on Pacific Coast Highway in Malibu. There is no reference to any surveys, studies, investigation, or testimony on this point by either experts or knowledgeable laypeople. In fact, there is not even any evidence that the other accessways on Pacific Coast Highway in Malibu are actually safe and suitable, never mind the La Costa Lot itself. In fact, the Commission is required to make an affirmative finding that the public access is consistent with public safety — and a finding merely stating that it is "no worse" than existing accessways is clearly insufficient.

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"[T]he [California Coastal Commission's] findings must support the decision and the evidence must support the findings." *Healing v. California Coastal Commission*, 22 Cal. App. 4th 1158, 1167 (1994) (writ against Commission granted when no evidence supported Commission's finding). Thus, a conclusory statement in findings, unsupported by any evidence in the record, is per se insufficient. The Commission's finding on public safety utterly fails to meet the requirements of the Coastal Act.

The Commission's finding suffers from yet another defect: it was added after the fact. The original Staff Report of March 22, 2000, which was heard and adopted by the Commission on April 12, 2000, did not contain a word about traffic or beach safety at the La Costa Lot. See 11 AR 573-608. The above-quoted finding on traffic safety, conclusory and inadequate as it is, was included only in the Revised Findings adopted on June 13, 2000 (See 13 AR 1099, 1105-1106), in order to "address" the substantial evidence presented at the April 12, 2000 hearing that the La Costa Lot is not safe for public access. This, too, violates the Coastal Act. See 14 Cal. Code Regs. 13096.

The handful of factual assertions made by the Commission in the Revised Findings are actually contradicted, not supported, by the evidence. For example, the Commission "finds" that the La Costa Lot site is located "along a relatively straight section of the highway with adequate sight distance and that there is adequate area for along the beachfront side of the street. In addition, a stop light with a pedestrian crossing is located a few hundred feet to the west of the site." 13 AR 1105. In fact, the evidence presented to the Commission on April 12, 2000 was entirely to the contrary: the sight distance is poor (11 AR 832, 843-844); there is inadequate street parking in the area for residents (11 AR 816, 822, 825, 832, 843-844, 847); there is no public parking in the vicinity (12 AR 1027); and the signalized crosswalk is over 1,000 feet away, too far to service beachgoers carrying children and beach equipment (11 AR 824; 12 AR 1021, 1031, 1040, 1042-1043). Substantial additional evidence was presented to the Commission by competent first-hand witnesses, including the Mayor of the City of Malibu and a former member of the City of Malibu Transportation Commission (12 AR 1035) that the public access provided by the La Costa Lot is not merely inadequate but is downright dangerous. For example, the City of Malibu, by Mayor Carolyn Van Horn, wrote:

1 "Pacific Coast Highway at this location is on a curve. Thus, both
2 pedestrian and motorist sight distance is limited. This location has a
3 high vehicle accident history. According to statistics provided by the
4 Los Angeles County Sheriff's Department some 20% of all vehicle
5 collisions on Pacific Coast Highway, from Topanga Canyon Road to
6 the western City limits, in the last year have taken place along this
7 stretch of PCH. Vehicles travel at high speeds on this stretch of the
8 Highway; south-bound autos have frequently run off the road. Parking
9 is very limited adjacent to the beach; crossing the highway is
10 disruptive of traffic and dangerous to pedestrians. There are no traffic
11 signals or crosswalks in the vicinity of this access site to assist
12 pedestrians in crossing the Highway from the inland side to get to the
13 beach and vice versa." 11 AR 1041-1044.

14 The City of Malibu also provided traffic safety data for the intersection nearest the La Costa Lot in
15 the form of Statewide Integrated Traffic Hazard System reports ("SWITRS"), 11 AR 893-895, which
16 indicated a high level of traffic accidents near the site. 11 AR 893-895. Additionally, many long
17 time residents provided first hand accounts, both in writing and in oral testimony, of the location's
18 dangers to both traffic and pedestrian safety. Virtually every community member who wrote a letter
19 or testified had personally witnessed or been involved in multiple vehicle-related accidents in the
20 vicinity of the proposed mitigation site. See 11 AR 815 - 896; 12 AR 1005-1069.

21 In short, the only evidence before the Commission was that the portion of Pacific Coast
22 Highway immediately adjacent to the La Costa Lot was extremely dangerous to both motorists and
23 pedestrians because of high traffic speed, inadequate sight distance, and the curved nature of the
24 highway; that there had been many traffic accidents in that location; and such accidents would
25 dramatically increase if pedestrian beach access were opened at the proposed location. 11 AR 1021,
26 1026, 1035-1036, 1040, 1044, particularly given the complete lack of any public parking at this
27 location. 11 AR 822, 847; 12 AR 1040.

28 ///

1 Thus, the Commission's purported "finding" that the La Costa Lot was safe for public access
2 - actually that the traffic safety at the La Costa Lot is "no worse" than existing accessways in Malibu
3 - is clearly unsupported by the evidence in the record of the April 12, 2000 proceedings.

4

5 2. The Commission's Finding That The Beach Adjacent To The La Costa Lot Is Safe For
6 Recreation Is Unsupported By Any Evidence.

7 The Commission's finding on the safety and suitability of the beach itself is as inadequate as
8 the finding on pedestrian and traffic safety. In its Revised Findings⁷, the Commission states:

9 "Further, in regards to concerns that the coastal waters near the
10 proposed mitigation site are subject to hazardous currents and that,
11 therefore, the mitigation site is not suitable for the provision of public
12 access to the beach from the highway, the Commission notes that the
13 offshore currents near the subject site are substantially similar to other
14 areas of the Malibu coastline. Therefore, the Commission finds that the
15 availability of public access to the sandy beach at the subject site does
16 not constitute a greater hazard than the provision of public access to
17 the sandy beach anywhere else along the Malibu coastline."

18 13 AR 1105-1106.

19 Once again, there was no evidence at the hearing, and there is none in the record, that the
20 beach off the La Costa Lot "presents no greater hazard" than anywhere elsewhere along the Malibu
21 coastline. Once again, there is no reference to any surveys, studies, investigation, or testimony on
22 this point by either experts or knowledgeable laypeople. Once again, there is not even any evidence
23 that the access to every other sandy beach along the Malibu coast is in fact safe and suitable. Again,
24 the Commission failed to make an affirmative finding regarding the safety of the beach for public
25 use as required by the Coastal Act. Once again, a conclusory statement in findings, unsupported by

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7 As with the issue of pedestrian and motorist safety, the March 28, 2000 Staff Report prepared for
the April 12, 2000 hearing did not address the subject of beach safety. See 11 AR 673-688. The
quoted paragraph about beach and ocean conditions was only added after the fact in the Revised
Findings adopted on June 13, 2000, 13 AR 1105-1106. This alone requires reversal of the
Commission's decision. See 14 Cal. Code Regs. 13096.

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any evidence in the record, is *per se* insufficient. *Healing*, *supra*, 22 Cal. App. 4th at 1167. The Commission's finding on beach safety, like its finding on traffic safety, falls woefully short of the evidentiary standard required by the Coastal Act.

Furthermore, as with the issue of traffic safety, the only evidence before the Commission on the subject of beach safety directly contradicted the Commission's conclusory assertion that La Costa Beach was safe. Numerous long time residents of Malibu, including petitioners, gave first hand accounts to the Commission of the strong rip tide, precipitous deep water shelf and rocky nature of the La Costa beach swimming area adjacent to the Lot. 11 AR 818; 12 AR 1026, 1040, 1042, 1044. Indeed, local resident Todd Sloan, a U.S. Marine Corp certified scuba instructor, testified that the mitigation site "is an area of significant rip tides . . . I know enough about riptides and rocks . . . I can say to you that there is going to be very, very serious problems." 12 AR 1032.

Thus, the Commission's purported "finding" that the off-shore currents at the La Costa Lot are "substantially similar" to other areas of Malibu - and that, therefore, the beach is safe - is unsupported by any evidence in the record.

C. The Commission Failed To Make Any Required Findings On The Suitability of the Site For Public Access.

PRC §30214 provides in relevant part:

"The public access policies of this article shall be implemented in a manner that takes into account the need to regulate the time, place, and manner of public access depending on the facts and circumstances in each case including, but not limited to, the following:

- (1) Tonographic and geological site characteristics.
- (2) The capacity of the site to sustain use and at what level of intensity.
- (3) The appropriateness of limiting public access to the right to pass and repass depending on such factors as the fragility of the natural resources in the area and the proximity of the access area to adjacent residential uses.
- (4) The need to provide for the management of access areas so as to protect the

1 2 3 4
1 privacy of adjacent property owners and to protect the aesthetic values of the area by
2 providing for the collection of litter." (Emphasis added)

3 4 5 6
The Commission gave no consideration whatsoever to these required factors and made no
findings addressing the mandate of PRC §30214 to take into account the facts and circumstances of
each case. No analysis of the future use of the La Costa Lot for beach access was provided to the
Commission. In fact, the Commission was given no information regarding what level of public use
was anticipated.

7 8 9 10
The Commission utterly failed to address the suitability of the La Costa Lot for public use.
The Commission gave no consideration to the need for public services, parking and other amenities;
nor to the suitability of access in light of topographic site characteristics, the capacity of the site, the
proximity to residential uses and the protection of privacy and aesthetic values. Despite the fact that
residents testified that there is no public parking available nearby, no commercial or public services,
and no amenities of any kind for beachgoers, the Commission did not address the suitability of the
site to sustain use by the public.

11 12 13 14
The lack of any finding regarding the suitability of the La Costa Lot for public access
pursuant to PRC §30214 renders the Commission's decision inadequate under the Coastal Act.

15 16 17 18
D. The Commission's Determination That The La Costa Lot Fully Mitigates The Impact
Of Appellants' Construction On Carbon Beach Is Unsupported By The Evidence

19 20 21 22
The Amendments purported to revise the manner in which the Applicants' homes' impacts
with respect to visual impacts on the beach were mitigated. The amended condition language allows
the substitution of the off-site mitigation parcel, the La Costa Lot, for the on-site view corridors
originally required for each of the three homes. In addition, the amended condition language allows
another substitution: in the event the La Costa Lot dedication is prevented through litigation, the
Applicants will provide \$1 million cash for unspecified coastal access programs in Malibu. 13 AR
23 24 25 26
1098-1099.

27 28
Chapter 3 of the Coastal Act requires that "[p]ermitted development shall be sited and
designed to project views to and along the ocean and sensitive coastal areas." PRC §30251. The

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1 Commission acknowledged its duty to make findings of consistency with §30251 in the Revised
2 Findings. 13 AR 1103. It also acknowledged the precedent that its prior decisions along Pacific
3 Coast Highway in Malibu were guided by application of the certified Malibu/Santa Monica
4 Mountains Land Use Plan or "LUP." The LUP requires the provision of a 20% view corridor on-site
5 to comply with the visual resources protection requirements of the Coastal Act. 6AR472-473, 9 AR
6 597; 27AR1628-1629, 31 AR 1876, 1880; 45AR2591; 49 AR 3387, 3391; 50AR3430. Specifically,
7 the Commission relied upon Policy 138 of the LUP to require that new development on a beachfront
8 property located on the seaward side of Pacific Coast Highway, such as the Applicants' sites, should
9 reserve 20% of the linear frontage of the lot in visually open area to provide and maintain adequate
10 public coastal views. 6AR472-473; 11 AR 716-719; 11 AR 755-759; 27AR1628-1630; 45 AR 2580-
11 2592; 50AR3430-2.

12 The findings of the Commission in regard to the Amendments' substitution of visual
13 resources mitigation are inadequate. Not only do the findings fail to explain how the La Costa Lot
14 will serve to protect views of Carbon Beach impacted by the Applicants' homes, the findings utterly
15 fail to explain how the payment of an arbitrary and large sum of money meets the visual protection
16 policies of the Coastal Act or the LUP. The Commission has no policy, standards or regulations to
17 ensure fair and equal application of the off-site substitution or the cash-out scheme. There is no
18 discussion of how far away an access might be or how to calculate the amount of money required to
19 mitigate a view impact. The Commission admits that "the proposed amendments will not serve to
20 protect public views of the ocean along Carbon Beach," the site of the Applicant's construction
21 projects. 13 AR 1105. The findings confirm only that the substitution of off-site for on-site
22 mitigation is consistent with the intent of the underlying permits. The Commission's findings fail to
23 compare the "lost" scenic views to the views gained by the La Costa Lot to determine if the quality
24 of what has been lost is mitigated by the La Costa Lot view corridor. The Commission's own
25 findings admit that the decision trades three view corridors along Carbon Beach for a single view
26 corridor on La Costa Beach, without any evidence that such substitution complies with the Coastal
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1 Act. The Commission established no nexus between the La Costa Beach Lot and the Applicants' homes, and furthermore the findings establish no nexus as to the level of payment which can, apparently, "buy" an applicant relief from the Chapter 3 view protection policies.

2 In fact, a review of the record shows, not only that there is no evidence to support the exchange of view and access mitigation, but that the evidence is to the contrary, highlighting the fact that this exchange was purely a backroom deal motivated by high-level influence. On January 16, 2000, the record discloses that the Commission Chair, Sam Wan, told Real Party Broad's representative (in a disclosed ex parte communication that was entered in the record) when he inquired about the suitability of the La Costa Lot as a substitute view and access corridor, that:

3 "the property was too far from the area to be able to claim a nexus
4 between the impact and the mitigation . . . [S]he informed me that
5 there was an OTD [Office to Dedicate beach access] just a few doors
6 away. Therefore I didn't see what argument could be made for the use
7 of the property." 32 AR 1930.

8 However, six weeks later, on March 6, 2000 Broad's representative informed Chair Wan about a meeting between California Secretary of Resources Mary Nichols, Coastal Conservancy Executive Director Bill Ahern, and Applicants Daly, Broad, and Saban and informed her that the La Costa Lot had been purchased to satisfy the view corridor requirements for all three Real Parties. 32 AR 1951. By April 12, 2000 Chair Wan was leading the way to a unanimous vote on the Amendments.

9 In *Corsens v. California Coastal Commission*, 182 Cal. App. 3d 277 (1986), the court upheld amendment of a public access condition to allow off-site mitigation. However, that case shows a careful evaluation by the Commission of the public safety issues involved where a power company sought to amend its on-site mitigation condition which was in conflict with safety measures required by regulations of the Nuclear Regulatory Commission ("NRC"). The court emphasized that "Under Public Resources Code section 30212 the Commission may decline to condition a new development permit on public access where it is inconsistent with the demands of public safety." *Corsens*, 182 Cal. App. 3d at 294. The Commission decision to limit public access within an NRC exclusion area and to substitute off-site mitigation was found reasonable under the

1 circumstances, and both the record and the Commission's findings contained evidence to support its
2 decision on off-site mitigation.

3 Here, on the other hand, there is no evidence to support the need to substitute off-site for on-
4 site view mitigation, nor are there sufficient findings to justify the off-site mitigation nor to justify
5 the \$1 million cash payment.

6

7 **IV. THE COMMISSION VIOLATED CEQA BECAUSE ITS STAFF REPORT UTERLY**
8 **FAILS TO ANALYZE ENVIRONMENTAL IMPACT, MITIGATION OR**
9 **ALTERNATIVES**

10 In addition to the findings required under the Coastal Act, the decision to commit the La
11 Costa Lot to use as a public beach access requires review of environmental consequences under
12 CEQA. Although the Commission staff report may serve as the "functional equivalent" of an
13 Environmental Impact Report ("EIR"), the Commission must comply with CEQA in ensuring that
14 the environmental impacts of the proposal are analyzed and mitigated and must comply with
15 CEQA's procedural requirements to ensure timely public input on environmental issues and
16 adequate response to public concerns. Here the Commission did neither.

17

18 **A. The Standard of Review**

19 Like a decision under the Coastal Act, under CEQA, a decision must be supported by
20 substantial evidence in light of the whole record. PRC § 21168; *Planning and Conservation League*
21 v. Department of Water Resources, 83 Cal. App. 4th 892, 911 (2000).

22 In the case of the Coastal Commission, the Commission's permit issuance procedures
23 constitute a "certified regulatory program" and the Commission may use its own written
24 documentation in lieu of or as a "functional equivalent" of an EIR required by CEQA. PRC §
25 21080.5; *Mountain Lion Foundation v. Fish and Game Commission*, 16 Cal. 4th 105, 113-114
26 (1997). PRC § 21080.5 (c) exempts such certified regulatory programs from certain procedural
27 sections of CEQA. However, "[t]he agency operating pursuant to a certified regulatory program
28 must comply with all of CEQA's other requirements." *Mountain Lion Foundation*, 16 Cal. 4th at

1 114. Thus, the agency must comply with the substantive requirements of CEQA as well as the
 2 procedural requirements of its own regulatory program. Failure to follow the procedures of its own
 3 regulatory program constitutes an abuse of discretion pursuant to Code of Civil Proc. §1094.5(b).
 4 *Mountain Lion Foundation*, 16 Cal.4th at 137.

5 An agency must prepare an EIR whenever substantial evidence in the record supports a fair
 6 argument that a project may have a significant impact on the environment. *Laurel Heights*
 7 *Improvement Association v. Regents of the University of California*, 6 Cal.4th 1112, 1113 (1993); *No*
 8 *Oil, Inc. v. City of Los Angeles*, 13 Cal.3d 68, 75 (1974). Where the agency determines that
 9 significant impacts to the environment may occur, and an EIR (or functional equivalent) is called for,
 10 the agency's determinations of the factual questions must be supported by substantial evidence. See
 11 *Laurel Heights*, *supra* 2, 6 Cal.4th at 1135-6 (1993); PRC §§ 21168 and 21168.5. An agency may not
 12 approve a project if there are feasible alternatives or feasible mitigation measures available that
 13 would substantially lessen any significant adverse effect which the activity may have on the
 14 environment. PRC § 21080.5(d)(2)(i). An EIR (or functional equivalent) is also required to discuss
 15 the "no-project" alternative and its impacts. 14 Cal. Code Regs. 15126.6(a); see *County of Inyo v.*
 16 *City of Los Angeles*, 124 Cal. App.3d 1, 9 (1981).

17 **B. The Commission Violated CEQA Because Potential Environmental Impacts Were
 18 Never Addressed and No Mitigation Was Considered or Required of the Beach Access
 19 Project**

20 In connection with Amendments with which the Commission acted to require the dedication
 21 of public access to the beach over the La Costa Lot, the Commission staff reports make no effort to
 22 comply with CEQA by identifying potential environmental impacts of providing public beach access
 23 at that location. In fact, the provision of public beach access over the La Costa Lot is a "project"
 24 under CEQA and requires environmental review. Imagine if the owner of the La Costa Lot had
 25 sought to apply to the Commission to erect a hot-dog stand on the La Costa Lot. We imagine that
 26 the Commission would have required volumes of data regarding the potential traffic, pedestrian
 27 safety, parking, access, litter, noise, aesthetic and other environmental impacts. However, because
 28

the Amendments proposed use of the site as a public beach and beach access, apparently the Commission felt such use was exempt from all scrutiny.

In the Revised Findings, subsection III.D (entitled "California Environmental Quality Act"), the Commission's entire attempt to comply with CEQA was rendered in one paragraph:

"The Commission finds that, the proposed amendment, as conditioned, will not have significant adverse effects on the environment, within the meaning of the California Environmental Quality Act of 1970. There are no feasible alternatives or mitigation measures that would substantially lessen any significant adverse effects that the activity may have on the environment. Therefore, the proposed amendment, as conditioned, is determined to be consistent with CEQA and the policies of the Coastal Act." 13 AR 1111.

The Commission's CEQA findings are nothing but conclusory. This boiler-plate finding pays lip service to CEQA and nothing more. Far from being supported by substantial evidence, the Commission's CEQA findings are supported by no evidence.

Even if the Commission argues that the rest of the Revised Findings are incorporated into the CEQA finding, the Commission fares no better. As discussed above, the Commission's other findings as they concern the traffic and beach safety of the public access at the LaCosta Lot are without evidentiary foundation or citation. In addition, the Revised Findings did not even attempt to address the anticipated level of public use of the La Costa Beach access, let alone to evaluate or quantify the traffic, parking and public service demands of the site.

The Commission's bare CEQA findings attest to the fact that the Commission did not perform a good faith analysis of the proposed public access site as required. There is no evidence that the Commission consulted with any local agencies with expertise in the area such as CalTrans, the local Sheriff's Department, or any other agency that could have provided evidence as to the safety of the highway access to the site. Nor did the Commission consult with the County Department of Beaches and Harbors, the State Recreation and Parks Department, the Coast Guard, the City of Malibu or any other authority, expert or lay, which could have provided evidence as to the viability

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of the beach for public use. Thus, the Commission has no real evidence as to La Costa beach's tidal conditions, rockiness or suitability for recreation. Instead, the Commission made pronouncements regarding safety unsupported by any, much less substantial, evidence. In addition, while the Commission explicitly finds in the Revised Findings that it has secured beach access for the public at the La Costa Lot, the Commission failed to study or address potential environmental impacts in the areas of traffic, vehicular access, pedestrian access, parking, pedestrian safety, public health, noise, trash, geologic stability, tidal conditions, privacy, aesthetics and security on the site or on its adjoining neighbors.

In fact, the record as a whole contains evidence of potential environmental impacts that were not addressed. In addition to the public safety issues discussed above, residents expressed concern regarding the fragility of the tide pools accessed from the La Costa Lot (11 AR 828-829), the aesthetic impacts of trash and litter (11 AR 517, 834) and the need for public services such as restrooms, lifeguards and security to serve the proposed project (11 AR 816, 818, 819, 825, 831, 834, 846, 891; 12 AR 1020, 1027, 1040).

Finally, the Commission's own CEQA findings acknowledge that it must consider feasible alternatives or mitigation measures. The Commission simply fails to provide any kind of analysis regarding alternatives, including the "no-project" alternative, and potential mitigation measures. Instead, a simple one sentence declaration that "[t]here are no feasible alternatives or mitigation measures that would substantially lessen any significant adverse effects that the activity may have on the environment" is all that the Commission makes in its Revised Findings. 13 AR 1110-1111. This falls far short of the requirements of CEQA.

The Commission cannot argue that the Petitioners failed to present expert evidence of traffic and safety hazards. The lack of meaningful traffic data specific to the site and to its use as a public beach is attributable to the Commission, not to the Petitioners who rallied to the April 12, 2000 hearing on a few days notice. As stated in *Sunstrom v County of Mendocino*, 202 Cal. App.3d 295,

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311 (1998), "CEQA places the burden of environmental investigation on government rather than the public," and an agency may not "hide behind its own failure to gather data" in dismissing environmental impacts. The *Sunstrom* court further held, in the context of rejecting a County's adoption of a negative declaration, that:

"If the local agency has failed to study an area of possible environmental impact, a fair argument may be based on the limited facts in the record. Deliberations in the record may unusually enlarge the scope of fair argument by lending logical plausibility to a wider range of inferences." *Id.*

See also, No Oil, supra, 13 Cal.3d at 84; King County Farm Bureau v. City of Hanford, 221 Cal. App.3d 692, 724 (1990).

Thus, the Commission cannot argue that Petitioners' letters and testimony, and those of the City of Malibu and others, lack credibility without conceding that the analysis of public safety and other environmental consequences relied upon by the Commission is nonexistent.

Clearly, the Commission did not comply with either the spirit or the letter of CEQA in hastily approving the La Corte Lot for public beach access without any consultation, consideration, analysis or discussion of impacts, alternatives or mitigation measures.

C. The Commission's Document and Procedures Failed To Fulfill The Requirements Of Its Certified Regulatory Program Exemption.

Throughout this litigation, the Commission has taken the position that as a certified regulatory program under PRC §21080.5 its permit issuing authority is exempt from CEQA. Thus, the Commission refused to comply with various Local Rules and Public Resources Code sections affecting the schedule of this case.

However, it is clear that PRC §21080.5 does not exempt the Commission from the substantive requirements of CEQA. Section 21080.5 allows state agencies with environmental responsibilities to use their own procedures for reviewing proposed projects in lieu of an EIR. *Mountain Lion Foundation, 16 Cal.4th at 116.* The Commission must have documentation which is

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1 functionally equivalent to CEQA documentation, and it must make findings supported by substantial
2 evidence demonstrating compliance with the substantive requirement of CEQA. In this case, the
3 record shows that the Commission utterly fails to provide substantive documentation equivalent to
4 CEQA documentation and utterly fails to make meaningful CEQA findings supported by substantial
5 evidence in the record. In fact, all the permits issued by the Commission and the Amendments
6 contain the identical hollow, "CEQA" findings which fail to address the issues of this case.
7 CAR475, 11AR088, (Schae), 27AR1633 (Broad) 45AR0394 (Daly), 13AR111-1111, 50AR1343
8 (Daly).

9 In *Mountain Lion Foundation v. Fish and Game Commission*, *supra*, 16 Cal.4th 105 (1997),
10 the California Supreme Court found that in order to claim exemption from CEQA's EIR
11 requirements, an agency must demonstrate strict compliance with its certified regulatory program.
12 In that case, the Court found that the Fish and Game Commission failed to follow the required
13 procedures in delisting an endangered species by, among other things, failing to respond to the
14 public's environmental objections prior to making its decisions and failing to assess feasible project
15 alternatives and mitigation measures. The Court rejected the Commission's post-decision making
16 findings, *Mountain Lion Foundation*, 16 Cal.4th at 132, and rejected the Commission's cursory
17 review of an alternative to the proposal, *Mountain Lion Foundation*, 16 Cal.4th at 136.

18 PRC § 21080.5 contains a substantial list of elements required in a certified regulatory
19 program in order to ensure that the program qualifies for the exemption from preparation of an EIR.
20 Among these elements are evaluation of feasible alternatives or feasible mitigation measures
21 (§21080.5(d)(2)(A)); consultation with all public agencies which have jurisdiction (§21080.5(d)(2)
22 (C)); and inclusion in the final section of written responses to significant environmental points raised
23 during the evaluation process (§21080.5(d)(2)(D)). This section also requires that the agency's
24 documentation (in this case the Staff Report) be available for a reasonable time for review and
25 comment by other public agencies and the public (§21080.5(d)(3)(B)).

26 The record in this case shows a failure both in spirit and in fact to comply with these
27 requirements of the Commission's own certified regulatory program. The Staff Report was not
28 available for a reasonable time for review and comment by the public and was never made available

1 to any public agencies, including those such as the City of Malibu and the Sheriff's Department with
2 specific jurisdiction and expertise over the issues affecting the site. (11 AR 842; 12 AR 1034, 1031,
3 1032). The Commission cannot point to any evidence that the Commission consulted with
4 appropriate public agencies, provided the staff report to agencies and the public for a reasonable
5 amount of time, or responded to environmental comments prior to the final decision in writing. In
6 fact, the letter from the City of Malibu makes it clear that 1) the City of Malibu was not consulted,
7 2) the City did not receive more than three days notice of the hearing, 3) the City did not receive the
8 Staff Report prior to the hearing; and 4) the substantive comments of the City regarding traffic and
9 other serious environmental impacts went without response, either written or oral, prior to the
10 decision. 11 AR 842-844. In fact, the City of Malibu learned about the proposal for beach access at
11 the La Costa Lot only six days before the first and final Commission hearing and decision on the
12 matter. 11 AR 842.

13 Environmental issues such as traffic safety, beach safety, public services, aesthetics and noise
14 raised by the public were never addressed or responded to in writing. Therefore, the Commission's
15 decision did not comply with CEQA nor with the requirements of its own certified regulatory
16 program.

17 V. CONCLUSION

18 For the foregoing reasons, petitioners respectfully request this Court to issue a writ of mandamus
19 commanding the Commission to set aside its decision of April 12, 2000 granting Applicants'
20 coastal development permits.
21

22 Dated: February 20, 2001

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